Supreme Court, U.S.
FILED
MAY 10 1978
MICHAEL RODAK, JR., CLERK

No. 77-1321

In the Supreme Court of the United States

OCTOBER TERM, 1977

NICHOLAS PALUMBO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
JOHN J. LOFTUS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1321

NICHOLAS PALUMBO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 66-68), is noted at 568 F. 2d 770-771.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1978. The petition for a writ of certiorari was filed on March 20, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly ruled as a matter of law that Percodan is a Schedule II controlled substance.

2. Whether the evidence was sufficient to support petitioners' convictions.

3. Whether the admission of a statement by petitioner Chioda violated the other petitioners' right of confrontation.

4. Whether petitioners were denied a fair trial by errors and alleged bias on the part of the trial judge.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to possess narcotics with intent to distribute them, in violation of 21 U.S.C. 846.[1] Petitioner Palumbo was sentenced to 15 years' imprisonment, petitioner Chioda was sentenced to 12 years' imprisonment, and petitioner Shine was sentenced to nine years' imprisonment. All three terms were to be followed by three years' special parole. The court of appeals affirmed without opinion (Pet. 66-68).

The evidence showed that on October 1, 1976, 44 cases of Percodan were stolen from a large shipment of drugs (I Tr. 56). Three days later petitioner Chioda asked Robert Critelli, a long-time friend, to meet with him and petitioner Palumbo. At the meeting, Palumbo and Chioda asked Critelli to handle the sale of an unspecified quantity of Percodan they had recently acquired (IV Tr. 35-40). Critelli agreed and subsequently obtained orders for the Percodan from several of his associates (IV Tr. 56-70). On at least two occasions during negotiations between Critelli and petitioners Chioda and Palumbo, petitioner Shine loaded quantities of Percodan into Critelli's car (IV Tr. 73-75, 106). One of Critelli's associates later disclosed the

[1]Petitioners were acquitted on four substantive counts of possession and distribution of narcotics (IX Tr. 36-38).

distribution scheme to a friend of his, who was a DEA informant (I Tr. 72-74). The informant then arranged for an undercover DEA agent to make several purchases of Percodan (I Tr. 76-78; VII Tr. 26-28; II Tr. 239). After the purchases had been completed, three of the sellers were arrested (II Tr. 240; V Tr. 24; I Tr. 96). Petitioners were arrested several weeks later.

ARGUMENT

1. Petitioners contend (Pet. 26-37) that the trial judge erred in concluding that Percodan is a drug regulated under Schedule II of the Controlled Substances Act. Although the trade name Percodan is not listed under Schedule II, expert testimony established that Percodan contains a salt of oxycodone, known as 14-hydroxidihydrocodeinone (VIII Tr. 8-11). The expert testimony was confirmed by the Merck Index, an encyclopedia of chemicals and drugs. Accordingly, since Schedule II includes the salt of any substance it lists, such as oxycodone, Percodan is within Schedule II. 21 C.F.R. 1308.12(b)(1)(15). There is no merit to petitioners' contention (Pet. 35-36) that the 14-hydroxidihydrocodeinone found in Percodan is not a salt of oxycodone under Schedule III, but rather a Schedule II substance, dihydrocodeinone (21 C.F.R. 1308.12(c)). The expert testimony at trial established that 14-hydroxiydihydrocodeinone is an entirely different substance from dihydrocodeinone. Similarly, the Merck Index lists the 14-dihydroxidihydrocodeinone in Percodan under the heading of oxycodone (VIII Tr. 8-11). Accordingly, the district court correctly concluded that Percodan is a Schedule II controlled substance. This question does not in any event merit consideration by this Court.

Petitioners' additional contention (Pet. 63-65) that the district court erred in not permitting the jury to decide whether Percodan should be classified under Schedule II

of the Controlled Substances Act also lacks merit. Since classification under the Controlled Substances Act is a question of law, petitioners had no right to have the jury decide that question. *United States* v. *Gould*, 536 F. 2d 216, 219 (C.A. 8). In any event, petitioners themselves urged the court to decide the question (VIII Tr. 5); they did not request that the classification question be submitted to the jury. They therefore cannot raise the claim now. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7.

2. Petitioners next contend (Pet. 38-43) that even if Percodan is a controlled substance, their convictions must be reversed because there was insufficient evidence that they knew Percodan was a narcotic or a Schedule II drug and that they entered into a conspiracy to distribute it.

Under the Controlled Substances Act, a defendant who has actual or constructive knowledge that he possesses a controlled substance may have the state of mind necessary for conviction even if he does not know which particular controlled substance he possesses. *United States* v. *Jewell*, 532 F. 2d 697, 705 (C.A. 9), certiorari denied, 426 U.S. 951; *United States* v. *Davis*, 501 F. 2d 1344, 1346 (C.A. 9). In this case, the government's proof showed that petitioners entered into an agreement to distribute a substance they knew was controlled. At the time he first opened negotiations with Critelli, petitioner Chioda, in the presence of petitioner Palumbo, tossed a bottle of Percodan to Critelli, saying "it's a bottle of Percodan pills * * * Read the pamphlet inside. * * * It's a depressant" (IV Tr. 40). In addition, petitioners' furtive method of distributing the Percodan to Critelli, coupled with the fact that petitioners Chioda and Palumbo ran a company

specializing in chemicals (at which petitioner Shine was employed), indicated that petitioners were well aware that they were dealing in a controlled substance.[2]

The evidence was also ample to tie each petitioner to the conspiracy. Petitioners Palumbo and Chioda asked Critelli to help them distribute Percodan (IV Tr. 35-40). Chioda directed the distribution operation and petitioners Palumbo and Shine actively assisted him (IV Tr. 43-78). Palumbo was present when Chioda discussed the distribution scheme with Critelli, and he provided cartons of pills to Critelli on two occasions (IV Tr. 43-45, 69). Shine twice loaded Critelli's car with cartons containing the pills under circumstances strongly suggesting that he knew the cartons contained contraband (IV Tr. 74, 106). Plainly, there was sufficient evidence from which the jury could conclude that each petitioner knowingly engaged in the conspiracy.

3. Petitioners next contend (Pet. 52) that it was a violation of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123, to admit the testimony of Critelli

---

[2]There is no merit to petitioners' claim (Pet. 43-52) that the evidence was insufficient because it consisted primarily of the testimony of co-conspirator Critelli. The cases on which petitioners rely (Pet. 46-47) stand for the proposition that before hearsay statements of a co-conspirator can be introduced, some independent evidence of the existence of the conspiracy is required. Those cases do not stand for the proposition that any in-court testimony by a co-conspirator is incompetent unless supported by independent evidence. Since Critelli was subject to cross-examination, his testimony was admissible against petitioners whether or not it was corroborated by independent evidence of the conspiracy. To the extent that Critelli's testimony contained potential hearsay statements of others, the jury was properly instructed that it first had to find from independent evidence that a conspiracy existed before it could consider the statements of one alleged co-conspirator against another (IX Tr. 15-16), a finding that could, of course, be based on Critelli's trial testimony.

and undercover agent Wainen about a conversation between Critelli and Chioda after Critelli had been arrested. In the course of that conversation, Chioda reminded Critelli that he still owed $5,200 for the pills he had purchased, and he added, "we know that you don't have the money you owe us from the pills, but we would expect that when you do have it, that you pay us" (V Tr. 75). Undercover agent Wainen overheard a portion of the conversation, in which Critelli told Chioda: "Remember, if Ciccone is talking, he picked up a box of pills from you" (VII Tr. 51), to which Chioda responded: "Yeah, I remember Ciccone being here once" (*ibid.*).

The admission of these statements did not violate the principles of *Bruton*. Chioda's effort to pressure Critelli to make payment for his pill purchases was clearly in furtherance of the objects of the conspiracy and thus would be admissible as a co-conspirator's declaration against the other two petitioners, assuming it had some probative force as to them. In fact, however, neither that statement nor Chioda's other statements in the course of the conversation significantly implicated the other two petitioners. Thus, there is no basis for claiming that they were harmed by the admission of those statements.

4. Finaliy, petitioners contend that the cumulative effect of errors committed by the court and the court's hostile attitude toward them deprived them of a fair trial (Pet. 56-63). Aside from citing a number of incidents that clearly do not constitute error or show bias,[3] petitioners

[3]Petitioners contend that the judge either erred or showed bias when revoking defendants' bail. However, the record shows that petitioners have long criminal records, that substantial cash withdrawals were made as if in anticipation of flight, and that witness Critelli was placed in the witness protection program because of several threats and menacing incidents (Sentencing Tr. 6, 20-21). Petitioners also contend that the trial judge overlooked the government's violation of the discovery rules by allowing the government to withhold witnesses' statements referring to petitioners (IV Tr. 115-120). Since neither the district court's discovery orders nor the Jencks Act, 18 U.S.C. 3500, compelled the pre-trial disclosure of statements made by government witnesses, this claim is without substance. Finally, petitioners contend that the prosecutor exceeded the scope of defense arguments on rebuttal (VIII Tr. 131). However, the record shows that defense counsel discussed the same areas in their summation, thus opening those areas for proper rebuttal by the prosecutor (VIII Tr. 132).

rely primarily on the district court's admonition to defense counsel at one point to "shut up and sit down * * * yes, please sit down. I've had enough over there" (VIII Tr. 135). The court's remark came after defense counsel had repeatedly interrupted the prosecutor's closing argument. As soon as the prosecutor had finished speaking, the court turned to the jury and apologized (VIII Tr. 138-139):

> A few moments ago I did something that no judge is supposed to do. I lost my temper. They have a perfect right to object. If I didn't agree with their objection, I could have just calmly overruled it. I was wrong. And you are to make no inference toward their clients because of that.
>
> The reason I did that is because—I'm not the best judge in the world, but I demand decorum in my courtroom. That's why I did it.

Even if improper, the court's comment was brief and was followed by a careful apology and curative instruction to the jury. The comment clearly did not deprive petitioners of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
JOHN J. LOFTUS,
Attorneys.

MAY 1978.

DOJ-1978-05